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No. 87-65.

# In the
# Supreme Court of the United States.

OCTOBER TERM, 1987.

UNITED STATES OF AMERICA,
PETITIONER,

*v.*

PROVIDENCE JOURNAL COMPANY AND
CHARLES M. HAUSER,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

## Brief Amicus Curiae of the American Civil Liberties Union, The Civil Liberties Union of Massachusetts, and the Rhode Island Civil Liberties Union.

MARTHA MINOW,
KATHLEEN M. SULLIVAN,
Harvard Law School,
Griswold Hall,
Cambridge, Massachusetts 02138.
(617) 495-4276

MARJORIE HEINS,
*Counsel of Record.*
Massachusetts Civil Liberties
Union Foundation,
19 Temple Place,
Boston, Massachusetts 02111.
(617) 482-3170

JOHN A. POWELL,
STEVEN R. SHAPIRO,
American Civil Liberties Union,
132 West 43rd Street,
New York, New York 10036.
(212) 944-9800

LYNETTE LABINGER,
Rhode Island Civil
Liberties Union,
344 Wickenden Street,
Providence, Rhode Island 02903.
(401) 421-9794

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

## QUESTION PRESENTED.

Whether the First Circuit correctly refused to extend the collateral bar rule to a transparently invalid prior restraint of pure speech, and allowed a newspaper and its editor to raise the obvious unconstitutionality of a gag order as a defense in a contempt proceeding commenced against them?

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In the Supreme Court of the United States
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United States of America,
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On Writ of Certiorari To the United States Court of Appeals for the First Circuit

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# Brief Amicus Curiae of the American Civil Liberties Union, the Civil Liberties Union of Massachusetts, and the Rhode Island Civil Liberties Union

## INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide nonpartisan organization dedicated to defending the freedoms embodied in the Bill of Rights. The Civil Liberties Union of Massachusetts and the Rhode Island Civil Liberties Union are its statewide affiliates.

Throughout its 65-year history, the ACLU has been particularly concerned about

the corrosive effect of prior restraints in a democratic society. The ACLU and its affiliates have therefore been involved in numerous cases, both in this Court and lower courts, addressing the constitutionality of prior restraints.

This case involves a transparently invalid prior restraint imposed on a newspaper. Respondent disregarded that order and was held in contempt. If that contempt order is now affirmed by this Court, a new and significant exception will have been created to the substantive rules against prior restraint. Amici urge this Court to reject that result, and submit this brief in support of the respondents to express our fundamental organizational concerns.

## STATEMENT OF THE CASE

Amici adopt the Statement of the Case



set forth by the respondents.

## SUMMARY OF ARGUMENT

In Walker v. City of Birmingham, 388 U.S. 307 (1967), this Court approved the State of Alabama's "collateral bar" rule, which prohibited a litigant from asserting a constitutional defense to a contempt of court charge arising from the violation of a judicial order. In so doing, the Court permitted an exception, under the special circumstances of Walker, to the time-honored process by which citizens may challenge unlawful exercises of governmental authority by disobeying that authority and then defending their actions in subsequent criminal proceedings. This Court emphasized in Walker that its ruling did not apply to pure speech and also specifically exempted judicial orders that are "transparently invalid" or have "only a

frivolous pretense to validity." 388 U.S. at 315.

The Court of Appeals for the First Circuit properly applied this language in Walker by permitting a challenge to the constitutionality of a gag order in this case. Not only was the district court's order transparently invalid, but it also was a prior restraint of pure speech -- the most highly suspect of all First Amendment infringements, and the one most inimical to democratic government. Nothing in Walker or any other decision of this Court requires mandatory compliance with a prior restraint except in the most extraordinary situations. The facts in this case fall far short of meeting this well-established test.

Nor does this case present a compelling argument for extending Walker. Respect for law only decreases if courts



can punish the exercise of fundamental rights through unreviewable criminal contempt penalties. Conversely, permitting parties to defend their disobedience on the merits preserves respect for the judicial process. Courts regularly adjudicate the validity of nonappealable judicial orders in the context of contempt without noticeable diminution in respect for the judiciary.

The First Circuit's refusal to extend the collateral bar rule to a circumstance in which a litigant declined to obey a patently invalid gag order fully comports with this Court's precedents. The constitutional stakes are especially high in a prior restraint context. If a prior restraint can only be challenged on appeal, as petitioners argue, then the decision regarding what and when to publish will have passed from editors to judges.

Nothing in this case justifies such a dramatic departure from basic First Amendment principles.

## ARGUMENT

### I. THIS COURT'S DECISION IN WALKER V. CITY OF BIRMINGHAM DOES NOT PRECLUDE DEFENDANTS IN CONTEMPT PROCEEDINGS FROM ASSERTING THAT THE ORDER THEY VIOLATED WAS A TRANSPARENTLY INVALID PRIOR RESTRAINT OF PURE SPEECH.

Under this Court's decision in Walker v. City of Birmingham, 388 U.S. 307 (1967), the collateral bar rule does not apply to judicial orders that are transparently invalid, or that restrain pure speech. The publication of a news story by the Providence Journal, in violation of a plainly unconstitutional gag order, falls squarely within both of these exceptions. Thus, the Journal should not be precluded from challenging the validity of the



temporary restraining order in defense to the charge of contempt. Any other result, as the Court of Appeals concluded, would involve an unacceptable sacrifice of First Amendment freedoms. A reasonable, good faith effort to pursue judicial relief within the time constraints of a daily newspaper's publication deadline is the most that may be required, as the Court of Appeal's en banc opinion held.

#### (A) The Collateral Bar Rule Does Not Apply to Transparently Invalid Orders.

This Court's 5-4 decision in Walker upheld a state law exception to the general rule that arguably invalid judicial orders, like statutes and legislative orders, may be disobeyed at the litigant's risk and then challenged on the merits as a defense to charges of contempt. See, e.g., Maness v. Meyers, 419 U.S. 449 (1975); United

States v. Ryan, 402 U.S. 530 (1971); Branzburg v. Hayes, 408 U.S. 665 (1972); Thomas v. Collins, 323 U.S. 516 (1945); United States v. Cobbledick, 309 U.S. 323 (1940).

The collateral bar rule is a departure from the usual proposition that the government cannot compel obedience to illegal orders. As a general rule, an individual in our system of government may disobey legislative, executive, or administrative directives and then argue as a defense in subsequent enforcement proceedings that the underlying prohibition was invalid. For example, defiance of an unlawful police order cannot be the basis for a criminal conviction. Wright v. Georgia, 373 U.S. 284 (1963). Similarly, an individual charged with violating a statute or ordinance may defend on the basis of the statute's illegality.



Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Hague v. CIO, 307 U.S. 496 (1939). Disagreement with an administrative regulation may require exhaustion of remedies, but this Court has approved collateral attack, after disobedience, "where there appears no significant interest to be served in having the [agency] decide the issue before it reaches the courts." McKart v. United States, 395 U.S. 185, 200 (1969). Even the subpoena power of Congress may be challenged in contempt proceedings. Barenblatt v. United States, 360 U.S. 109, reh'g denied, 361 U.S. 854 (1959). Finally, judicial orders that are interlocutory in nature may be challenged by disobedience and subsequent defense to contempt charges, e.g., United States v. Cobbledick, 309 U.S. 323 (1940), while judicial orders entered by courts that lack

jurisdiction are void, and may also be disregarded. United States v. United Mine Workers of America, 330 U.S. 258, 290-93 (1947); In re Sawyer, 124 U.S. 200, 220-22 (1888); Note, "Defiance of Unlawful Authority," 83 Harv. L. Rev. 626, 633-34 (1970).

This Court's decision in Walker approved Alabama's rule precluding Martin Luther King, Jr. and his fellow protestors from collaterally attacking a contempt citation issued for disobeying a judicial injunction against a public march. Walker, however, is a narrow decision. The majority in Walker carefully distinguished orders that are transparently invalid, or have "only a frivolous pretense to validity." 388 U.S. at 315. The majority specifically excluded from its decision restraints on pure speech unaccompanied by conduct which state and local governments



have a strong interest in regulating. Id. at 315. Moreover, the Court in Walker expressed doubt that its decision could have consequences much beyond "the circumstances of this case." Id.

In the twenty years since, numerous authorities have concluded that Walker does not apply to "transparently invalid" gag orders. See, e.g., 3 C. Wright, Federal Practice and Procedure § 702, at 815 n.17 (1982); Ex Parte Purvis, 382 So.2d 512, 514 (Ala. 1980); State ex. rel. Superior Court of Snohomish County v. Sperry, 79 Wn.2d 69, 74, 483 P.2d 608, 611, cert. denied, 404 U.S. 939 (1971); In re Berry, 68 Cal.2d 137, 150, 436 P.2d 273, 282, 65 Cal. Rptr. 273, 282 (1968). See also United States v. Roundtree, 420 F.2d 845, 853 (5th Cir. 1969)(refusing to enforce conviction arising from disobedience of court order to respond to Internal Revenue Service

summons); Glen v. Hongisto, 438 F.Supp. 10, 14-18 (N.D.Cal. 1977)(permitting defense on the merits to violation of injunction restricting both pure speech and picketing); Johnson v. Preston, 12 Ohio St.2d 100, 233 N.E.2d 132 (1967)(failure to seek modification of injunction does not preclude defense on the merits on basis of a change in the law); Wojahn v. Halter, 229 Minn. 374, 382, 39 N.W.2d 545, 549 (1949)(permitting collateral habeas challenge to imprisonment for violation of court order requiring payment of money; "[i]f . . . failure to obey a court's order requiring a debtor to pay an ordinary debt could be made the basis for a sentence of imprisonment on the ground that the debtor was guilty of contempt, little would remain of our constitutional protection against



imprisonment for debt").[1]

The "transparently invalid" rule clearly applies here. The Providence Journal faced a prior restraint of a newspaper article -- the most strongly disfavored interference with First Amendment freedoms. As the Court of Appeals decision demonstrates, the gag order rested on patently faulty conceptions

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1. Although the Court of Appeals for the Fifth Circuit held in United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972), that the violation of some invalid orders may justify contempt citations, the court also specifically acknowledged that transparently invalid orders could not compel such obedience. Id. at 509. Furthermore, the Court noted: "[g]iven [the] flexibility in contempt cases, an erroneous view regarding the lawfulness of the underlying order may well taint the judgment of contempt." Id. at 513. The Court supported this observation by citing Donovan v. City of Dallas, 377 U.S. 408 (1964)); and Dunn v. United States, 388 F.2d 511 (10th Cir. 1968), cases in which contempt judgments were vacated and remanded to determine whether a penalty should still be imposed once the order was ruled invalid on the merits.

of the Fourth Amendment, the Freedom of Information Act, 5 U.S.C. § 552 (1982 & Supp. III 1985), and the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-21 (1982 & Supp. III 1985).[2] In re Providence Journal, 820 F.2d

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2. This Court has rejected restraints on speech in much more compelling circumstances than those presented here, such as the risk to a fair trial posed in Nebraska Press v. Stuart, 427 U.S. 539 (1976), or the claimed threat to national security and foreign policy in the Pentagon Papers case, New York Times v. United States, 403 U.S. 713 (1971). The Providence Journal's story presented neither a danger to Sixth Amendment rights nor an issue of national security. The story presented none of the exceptional circumstances that existed in Snepp v. United States, 444 U.S. 507 (1980), where a former employee of the Central Intelligence Agency was held to have waived his First Amendment rights by agreeing to submit his writings to prior CIA review; or Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), where access to private information through the civil discovery process was held not to justify dissemination of that information in advance of trial. The gag order in the present case, purportedly entered to protect privacy, was squarely and transparently unconstitutional under this



1342, 1349-51 (1st Cir. 1986). Because the order was "transparently invalid" within the meaning of Walker, the newspaper was entitled to disregard it.

(B) The Collateral Bar Rule Does Not Apply to Prior Restraints of Pure Speech.

The Providence Journal was held in contempt for publishing a newspaper story. Walker v. Birmingham hardly compels that result. Justice Stewart's opinion for the Court in Walker carefully distinguished between pure speech and speech connected to conduct. 388 U.S. at 316, quoting Cox v. Louisiana, 379 U.S. 536, 555 (1965).

The district court's order underlying the contempt charge here is an example of "the most serious and least tolerable

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Court's decisions in Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977), and Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

infringement on First Amendment rights," Nebraska Press Association v. Stuart, 427 U.S. 539, 559 (1976), and the generalized judicial interest in securing obedience to its orders cannot overcome the constitutional presumption against such restraints on pure speech. See New York Times v. United States, 403 U.S. 713, 714 (1971).

In most cases involving pure speech, of the type published by the Providence Journal, any damage to private interests arising from the publication can be compensated after publication if, indeed, any legally cognizable injury can be shown. See Nebraska Press Association v. Stuart, supra, 427 U.S. at 571 (Powell, J., concurring). With pure speech, no concerns for preserving public safety or order can be cited, as they were in Walker, where the march proposed by Dr. Martin Luther King,



Jr. and his supporters transpired during a period of political instability and racial violence.[3] No similar factors appear here, where simple publication of a news story of general public interest is at issue.

## II. WALKER V. BIRMINGHAM SHOULD NOT BE EXTENDED TO PRECLUDE AN ALLEGED CONTEMNOR FROM CHALLENGING THE CONSTITUTIONALITY OF A TRANSPARENTLY INVALID PRIOR RESTRAINT OF PURE SPEECH.

The rationales that have been offered for the collateral bar rule are not sufficient to justify its extension to transparently invalid prior restraints of pure speech. These rationales include the need: (1) to guard against possible risks to public safety; (2) to assure respect for

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3. See generally J. Williams, Eyes on the Prize (1987)(Chapter 7); J. Skolnick, The Politics of Protest: The Skolnick Report to the National Commission on the Causes and Prevention of Violence (1969); S. Carmichael & C. Hamilton, Black Power: The Politics of Liberation in America (1967).

the rule of law; and (3) to discipline individuals who seek to be judge of their own case. Walker v. City of Birmingham, supra, 388 U.S. at 320-21.

Because pure speech neither threatens public safety nor undermines respect for the rule or law, these rationales cannot foreclose the defense of transparent unconstitutionality where the litigant has engaged in pure speech. And because the prospect of post-violation punishment will adequately discipline individuals who seek to "judge their own cases," the collateral bar rule is unnecessary to preserve respect for the judiciary.

(A) No Threat to Public Safety, or Indeed, to any Public Interest, Justifies Extension of the Collateral Bar Rule to a Transparently Invalid Prior Restraint of Pure Speech.

There is no claim in this case that the contempt citation against the



Providence Journal was required to guard against an imminent threat of violent or lawless action, Brandenberg v. Ohio, 395 U.S. 44 (1969), or an immediate and serious threat to national security. See Near v. Minnesota, 283 U.S. 697, 716 (1931). Indeed, there are no facts in this record even remotely approximating the kinds of extraordinary governmental interests that this Court has historically demanded as justification for a prior restraint. See discussion, supra, note 2. See also, e.g., Organization for a Better Austin v. Keefe, 402 U.S. 415, 418-20 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1968).

In this context, any supposed risk to public interests posed by the danger that some technically appealable court orders may be disobeyed should be handled in the same way that the system handles risks arising from disobedience to interlocutory

court orders, executive directives, statutes, congressional subpoenas, or administrative orders. An individual may disobey an order, ordinance or law and raise his constitutional claims as a defense in an enforcement proceeding, complete with the full safeguards of due process, rather than in the hurried context of arguments on a temporary restraining order or an expedited appeal.

(B) Respect for Law Will be Enhanced, Not Undermined, by Permitting a Defense on the Merits.

Respect for law increases, rather than decreases, when courts are as accountable as other branches of government for their unlawful acts. When the judiciary refuses to hear collateral attacks upon its own orders, it risks the appearance, at least, of engaging in an unjustified exercise in self-protection. Such appearances



ultimately injure society's interest in fostering respect for judicial processes. Moreover, allowing collateral attack on transparently invalid orders that burden pure speech would not reduce citizen compliance with lawful -- or even arguably lawful -- decrees, for the citizen still faces a substantial risk of criminal penalties if proven wrong.

The deterrence to disobedience under this approach is the correct one in the context of the First Amendment: only those litigants who are confident of full vindication on the merits will take the risk. Those who misjudge will remain subject to the punishment of contempt.

In many situations, violating a court order and defending on grounds of the order's invalidity is the only way to challenge it. E.g., Branzburg v. Hayes, 408 U.S. 665 (1972); United States v. Ryan,

402 U.S. 530 (1971). See also Maness v. Meyers, supra, 419 U.S. 449 (permitting defense on the merits to contempt flowing from violation of court order); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975), cert. denied sub nom. Cunningham v. Chicago Council of Lawyers, 427 U.S. 912 (1976)(permitting First Amendment defense for violation of court rules). This approach to enforcement is obviously feasible and workable. It has not led to a breakdown in respect for the courts. The deterrence that comes from the genuine risk that the party disobeying a court order may be wrong -- and may be punished after losing on the merits -- is the appropriate, tailored solution to the tension between the judiciary's demand for respect and the First Amendment's demand for the "breathing space" that it needs "to survive." NAACP v. Button, 371 U.S. 415,



433 (1963).

The argument that litigants should not be allowed to judge their own cases -- or, as the petitioners creatively frame it, to usurp the function of Article III courts -- is really just a regurgitation of the argument that courts deserve respect. It is not readily apparent why our system of government, which allows defenses on the merits after disobedience of statutes, executive orders, congressional subpoenas, interlocutory judicial orders, and judicial orders issued by courts lacking jurisdiction over the parties or over the subject matter, cannot also survive disobedience of transparently invalid injunctions that restrain the exercise of our most fundamental and vital freedom, the freedom to speak.

Permitting litigants in contempt proceedings to raise defenses on the merits

does not allow them to judge their own cases. The only question is the timing of the judicial review. Symbolic respect for law is significant but it is not advanced by prohibiting a defense on the merits to charges that a newspaper has defied an obviously unconstitutional gag order. As the First Circuit ruled en banc, the law requires good faith efforts to pursue emergency judicial relief before publication deadlines, but where the possibility of such relief is negligible, litigants must be permitted to defend against contempt charges on the merits.[4]

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4. Here, the First Circuit found no evidence that timely emergency relief was available within the constraints of the publisher's decision-making, and ruled that it would be unfair "to subject the publisher to the very substantial sanctions imposed by the district court because of its failure to follow the procedure we have just announced." In re Providence Journal, supra, 820 F.2d at 1355. Thus, the Court of Appeals -- the judicial body with the



In short, punishing the exercise of fundamental rights through unreviewable criminal contempt penalties lessens respect for the rights themselves and for the judicial process designed to protect them. As Justice Scalia recently observed, the "inherent power" of the judiciary "must be restrained by the totality of the Constitution, lest it swallow up carefully crafted guarantees of liberty." Young v. United States ex rel. Vuitton et Fils S.A., 107 S. Ct. 2124, 2146 (1987)(concurring

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greatest knowledge of its own procedures -- found that the Journal probably could not have obtained appellate relief in the approximately eight hours between the termination of the hearing before Judge Boyle and the publication deadline. Although, under the First Circuit's ruling, a monthly or even weekly publication would probably be required to seek appellate relief, a daily newspaper which is planning to publish an article the following day probably would not. Any other result would substitute judicial time schedules for editorial judgment in deciding when a news story should be published.

opinion).[5]

(C) Extending the Collateral Bar Rule to Transparently Invalid Prior Restraints of Pure Speech Would Impose Intolerable Burdens on First Amendment Freedoms.

The freedom from sanctions for disobeying an illegal order is never more critical than in a situation where, as here, the cost of compliance would have been irretrievable loss of constitutionally protected speech. As this Court has recognized, "the loss of First Amendment

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5. Failure to impose such limits ushered in the era of the labor injunction, hardly a period of judicial activity that strengthened respect for law. See Young v. United States ex rel. Vuitton et Fils S.A., supra, 107 S.Ct. at 2145-46 (Scalia, J., concurring); A. Cox & D. Bok, Cases and Materials on Labor Law 101-107 (1962); Walker v. City of Birmingham, supra, 388 U.S. at 330 (Warren, C.J., dissenting)("[t]he labor injunction fell into disrepute largely because it was abused in precisely the same way that the injunctive power was abused in this case").



freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). For that reason, this Court has articulated a heavy burden on any governmental entity that would impose a prior restraint. Nebraska Press, supra, 427 U.S. at 557-61; Organization for a Better Austin v. Keefe, supra, 402 U.S. at 418-20; Near v. Minnesota, supra, 283 U.S. at 716. That burden should not be reduced merely because the restraint is imposed by the judicial branch.

The seemingly simple obligation of obeying a court order pending its appeal may pose serious and irreparable damage to the speech and press rights of a newspaper. Ex Parte Purvis, supra, 382 So.2d at 514. See Maness v. Meyers, supra, 419 U.S. at 460-461 (where the injury from the erroneous order is irreparable and the

constitutional right involved has ancient roots, the violation may not be punishable by contempt if the order itself was invalid); Thomas v. Collins, supra, 323 U.S. 516 (rejecting as an intolerable prior restraint a temporary restraining order against a labor organizer).

In many circumstances, publication delayed means publication denied -- because the communication is no longer timely or immediate. See, e.g., Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 182 (1968); Pennekamp v. Florida, 328 U.S. 331, 346-47 (1946); Bridges v. California, 314 U.S. 252, 268 (1941). For example, a delay in publication could give outsiders an opportunity to interfere with the news reporting function through intimidation. Halting dissemination of news could alter election results, stock market behavior, or other significant



events that depend on the actions of people who await each daily newspaper for critical information about the world. "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." Nebraska Press, supra, 427 U.S. at 559. Surely, First Amendment freedoms cannot be safeguarded if an individual trial judge can decide the importance and urgency of a given news story.

The loss of First Amendment freedoms in the face of an expanded collateral bar rule threatens the vitality of the First Amendment itself. In this case, the Providence Journal was willing to risk punishment for speech by disobeying what it correctly perceived to be an unconstitutional prior restraint; other speakers or members of the press may not be

so willing. If illegal restraints curb speech, the resulting coerced silence harms speakers, listeners, and the vitality of a free society.

It is because of the great risk of sacrificing fundamental freedoms in the heat of perceived exigencies that the First Amendment struck the balance in favor of speech, and against prior censorship. When the government cannot muster specific evidence to show that an extraordinary public interest justifies the sacrifice of a First Amendment right in the name of compliance with a judicial order, the government should not be permitted to punish pure speech on the basis of procedural rule about the timing of litigants' objections. See Note, "Defiance of Unlawful Authority," supra, 83 Harv. L. Rev. at 639-40. Without constitutional limitations, the collateral bar rule could



permit the least democratically answerable public officials to punish and chill pure expression, where a statute or ordinance identical in content would remain subject to challenge on the merits after disobedience.[6]

Our judiciary is vital enough to survive violations of gag orders that are transparently invalid or have only a frivolous pretense to validity. It would betray, not advance, the rule of law if this Court expanded Walker to prohibit a newspaper from defending itself against serious criminal penalties on the ground that its action was not only constitutionally protected but entitled to the very highest solicitude under the Bill

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6. Indeed, unlike other government officers who act unconstitutionally, a judge is ordinarily immune from any liability for damages caused by his unlawful activity. See Stump v. Sparkman, 435 U.S. 349 (1978).

of Rights.

## CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

Martha Minow
Kathleen Sullivan
Harvard Law School
Cambridge, Massachusetts 02138
(617) 495-4276

Marjorie Heins
Counsel of Record
Massachusetts Civil Liberties Union Foundation
19 Temple Place
Boston, Massachusetts 02111
(617) 482-3170

John A. Powell
Steven R. Shapiro
American Civil Liberties Union
132 West 43rd Street
New York, NY 10036
(212) 944-9800



Lynette Labinger
Rhode Island Civil Liberties Union
344 Wickenden Street
Providence, Rhode Island 02903
(401) 421-9794

Counsel for Amici Curiae*

* This brief was written with the assistance of the students enrolled in Section II of the Harvard Law School class of 1990, and Ken Chesebro, J.D., Harvard Law School 1986.